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NO. 86-1962

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

CATHERINE duPONT SCHLAEPPI, *et al.*,
Petitioners,

v.

DELAWARE TRUST COMPANY, *Trustee, etc.*,
Respondent.

REPLY BRIEF ON CERTIORARI

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REPLY BRIEF ON CERTIORARI

A. THE DELAWARE SUPREME COURT DID NOT REST ITS DECISION OF THE CONSTITUTIONAL ISSUES UPON ANY NON-FEDERAL GROUND

Delaware Trust claims that the decision of the Delaware Supreme Court on the constitutional issues was based upon two non-federal grounds: (a) a decision on the defense of res judicata which was raised in Delaware Trust's motion to dismiss the complaint; and (b) a decision on the constitutionality of the challenged Delaware rule as to the standard of proof involved in disinheriting adopted children. (Br. at 6-7). It is obvious that the non-federal ground rule has no application: (a) neither the Vice Chancellor nor the Delaware Supreme Court *decided* the res judicata issue in connection with the constitutional issues; (b) the question of whether Delaware's standard of proof offends the Fourteenth Amendment is purely a question of federal law.

The Vice Chancellor refused to decide the res judicata issue in connection with the constitutional issues although Delaware Trust urged the Vice Chancellor to do so. Delaware Trust advised[1] the Delaware Supreme Court that "the Vice Chancellor did *not* decide whether Count III is also barred by the Delaware and Virginia Decrees", and argued that since that question was "fairly presented" to the Vice Chancellor the Delaware Supreme Court could decide the question on the appeal to it. Delaware Trust's contention here that the Vice Chancellor decided the res judicata issue is a total flip-flop from the opposite position taken by it before the Delaware Supreme Court. The Delaware Supreme Court itself *also* refused to decide the res judicata defense as to the constitutional issues by adopting the Vice Chancellor's opinion.

Even if the Vice Chancellor had decided the res judicata defense as to the constitutional issues, his discussion of that defense (as he applied it to two of the legal grounds asserted in Count I of the complaint) (Pet. at 8a), is so meritless that this Court would have had to declare such alleged non-federal ground totally inadequate within the purview of the non-federal ground rule. Delaware Trust does not address plaintiffs' argument (Pet. at 28-29). Delaware Trust does not controvert the fact that in the Settlement Agreement the adopted children *claim* was preserved—not extinguished—and that all parties thereto authorized plaintiffs to assert the adopted children claim in a new, separate action, without prejudice,[2] and without any restrictions as to the *legal grounds* which might be asserted in the new action.

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1. Answering Brief of Appellee Delaware Trust Company at p. 8, filed January 22, 1987.

2. Delaware Trust misleadingly omits (Br. at 3) paragraph C from its quotation of Article VI, which provides that the settlement is "without prejudice" to plaintiffs' right to continue litigation of the adopted children claim.

Further, Delaware Trust's argument is internally repugnant. In one breath, Delaware Trust argues that this Court lacks jurisdiction to determine the adequacy of the res judicata defense (Br. at 7), and in the next breath Delaware Trust argues that this Court should do what the Delaware Supreme Court refused to do, namely, decide the merits of the res judicata defense. (Br. at 9, n. 3).

As to Delaware Trust's contention that a Delaware settlor has a putative "right" to disinherit adopted children, that contention is merely a restatement in other words of the one issue involving the constitutionality of the challenged State rule. This contention conflicts with the most fundamental principles of federal jurisprudence. While the highest State court is the final arbiter of the meaning of a State rule, the question whether such a State rule offends the due process and equal protection clauses is purely a question of federal law. The Fourteenth Amendment mandates minimum requirements of due process which must be observed by a State in applying its standard of proof for determining alleged disinheritance[3] of adopted children. These federal constitutional minimum requirements are not diminished by a State court's opinion that the State rule is adequate, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982), *Vitek* v. *Jones*, 445 U.S. 480, 490-491 (1980), and the adequacy of the challenged Delaware rule herein "must be analyzed in constitutional terms". *Logan* v. *Zimmerman Brush Co., supra*, 455 U.S. at 432-433.

B. ENFORCEMENT BY THE DELAWARE SUPREME COURT OF THE INVIDIOUS DISCRIMINATION EMBODIED IN PROVISO (a) CONSTITUTES STATE ACTION

We have demonstrated (Pet. at 15-16) that acts of the

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3. "Disinheritance" is the accurate term since the Delaware adoption statute makes plaintiffs the statutory heirs of the settlor herein. 13 *Del. C.* §920(b). (Pet. at 72a).

Delaware Supreme Court in construing the indenture and the adoption statute and in enforcing the invidious discrimination which it found in Proviso (a) constitute State action. Delaware Trust does *not* controvert this demonstration, but argues that the Delaware Supreme Court did not really enforce the discrimination and merely "abstained" from action. It is self-evident, however, that the State did not abstain from action, but on the contrary, through its courts, decided the issues and instructed the trustee that plaintiffs should be disinherited, instructions which were supported by "the full panoply of state power." *Shelley* v. *Kraemer*, 334 U.S. 1, 19 (1948).

Nor can Delaware Trust make a virtue out of dereliction of fiduciary duty in seeking judicial instructions. That plaintiffs were compelled to act because of the trustee's refusal does not make the determination of the Delaware Supreme Court any less State action. For state action to exist, "the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination": *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 172 (1972).

C. ADOPTED CHILDREN SHOULD BE DECLARED A QUASI-SUSPECT CLASS

Plaintiffs demonstrated (Pet. at 13-15) that adopted children should be treated as a quasi-suspect class for Fourteenth Amendment analysis; they possess all of the characteristics of a quasi-suspect class, including a history of purposeful discrimination and discrimination based upon characteristics derived from birth.

Delaware Trust seeks to obfuscate the true issue by referring to cases involving *suspect* classes, not *quasi*-suspect classes, and Delaware Trust ignores the fact that the Delaware Supreme Court itself held that "[e]verything the Supreme Court said of illegitimates, by analogy, also is applicable to adopted persons". (Pet. at 14a). Finally, Dela-

ware Trust's authority for the proposition that adopted children have not been historically the victims of discrimination is the unsupported dictum of one lower federal court,[4] a dictum contrary to every book and article on the subject.[5]

Unfortunately, there can be no dispute that the history of adoption in this country is a history of treatment of adopted children as "second-class" citizens. Adoptees' Equal Protection Rights, 28 UCLA L. Rev. 1311, 1334-5 (1981). In this case Delaware's highest court has declared that the plaintiffs—six out of the 37 grandnephews and grandnieces and great grandnephews and great grandnieces of settlor—must be treated during their lives as "second-class" family citizens.

Vital interests of the plaintiffs and their parents are implicated here. It is a record fact that the plaintiffs were nurtured as infants and minors in a household in which there were no "second-class" family citizens. Any parent can understand how disastrously the subtle emotional and psychological underpinnings of the family have been disrupted by enforcement of this invidious discrimination. The "intangible fibers" which connect parent and child and

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4. *Williams* v. *Mathews*, 441 F. Supp. 1045, 1049 (E.D.La. 1977). All of the cases decided under the Social Security Act are inapposite since they deal with claims that adopteds fall into a suspect category.

5. B. Lifton, Lost & Found (1979); B. Tizard, Adoption: A Second Chance (1977); M. Kornitzer, Adoption and Family Life (1968); M. Langsam, Children West (1964); H. Kirk, Shared Fate (1964). *See also* the following articles: C.M.A. McCauliff, The First English Adoption Statute and Its American Precursors, 16 Seton Hall L. Rev. 656 (1986); R.W. Howe, Adoption Practice, Issues and Laws 1958-1983, XVII Family L. Quart. 173 (No. 3, Summer 1983); Y. Kawashima, Adoption in Early America, 20 J. Family L. 677 (1981-82); S.B. Presser, The Historical Background of the American Law of Adoption, 11 J. Family L. 443 (1971); Huard, The Law of Adoption: Ancient and Modern, 9 Vand. L. Rev. 743 (1956).

which provide our society with "strength, beauty and flexibility" have been torn asunder. "It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases": *Lehr* v. *Robertson*, 463 U.S. 248, 256 (1983).

Family interests are also involved herein. The family is the one institution through which our society inculcates and passes down its most cherished values. Therefore, freedom of personal choice in matters of family life, such as a stepfather's choice not to discriminate among his children on the basis of whether a child entered his family by birth or adoption, is a "fundamental liberty interest protected by the Fourteenth Amendment". *Bowen* v. *Gilliard*, ___ U.S. ___, Slip. Op. p. 3 June 25, 1987 (Brennan, J. dissenting); *Santosky* v. *Kramer*, 455 U.S. 745, 753 (1982). This Court may not be able to assure an adopted child that there will be no discrimination against him or her during his or her lifetimes on the sole ground of their being adopted, but this Court should be able to assure an adopted child that the Fourteenth Amendment will not allow any State—arbitrarily or capriciously or without any hearing—through rules applied in the State's courts to contribute to their pain. *Cf. Bowen* v. *Gilliard, supra*, ___ U.S. ___ Slip. Op. at 26 (Brennan, J. dissenting).

D. THE CHALLENGED DELAWARE RULE OFFENDS THE STANDARDS OF THE FOURTEENTH AMENDMENT

Although, as earlier shown (Pet. at 20), the Vice Chancellor applied a rule which is a sharp departure from the Delaware rule established by earlier decisions, we must accept formulation of the State rule as described by the Vice Chancellor and its affirmance by the Delaware Supreme Court, even though the complaint was dismissed without any consideration of the surrounding circumstances. The Delaware Supreme Court also held that plain-

tiffs had the *burden* of establishing the "insubstantiality of the State's rule". (Pet. at 14a).

This Court has pointed out that the function of a standard of proof is to instruct the fact-finder concerning the degree of confidence which society thinks he should have in the correctness of factual conclusions for a particular type of adjudication; that in any given proceeding the minimum standard of proof tolerated by due process requirements reflects society's judgment about how the risk of error should be distributed between the litigants. *Santosky* v. *Kramer, supra,* 455 U.S. at 754-755. In the ordinary suit for money damages it is appropriate to make the litigants share the risk of error. But a higher standard of proof is mandated when personal rights and interests are involved; where, as here, rights of innocent adopted stepchildren are involved, the Fourteenth Amendment requires that the risk of error be imposed on the proponents of disinheritance, *i.e.* an adopted stepchild not be disinherited except after a plenary trial, or—without a trial—only when the language of the dispositive instrument, read in light of the surrounding circumstances, is *certain* and *unmistakable* in its identification of the children purportedly disinherited. We have earlier shown that Proviso (a) does *not* contain any certain and unmistakable reference to the plaintiffs. (Pet. at 22-23).[6] *Santosky* v. *Kramer, supra,* 455 U.S. at 756.

Delaware Trust argues that this case presents "no issues of importance to anyone but the parties themselves." (Br. at 16). However, the number of adoptions in this

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6. In its brief, Delaware Trust misleadingly states that Proviso (a) refers to *"all"* adopted children when it actually refers only to *"an"* adopted child. Further, Delaware Trust in 30 instances in its brief refers to "an adopted *person*", when Proviso (a) actually refers to "an adopted *child*", and 13 *Del. C.* §§919 and 920 also refer repeatedly to "an adopted *child*".

country is ever increasing, and each new adoption creates relationships which are estimated to affect one-third of the population or 80 million people. (Pet. at 15, n. 20). Thus, the issue of interpretation of dispositive instruments involving adopted children has "become the subject of a seemingly endless stream of litigation",[7] and the same issues of standard of proof herein would have arisen under the laws of the other States if they were involved: most States provide by statute that an adopted child becomes the child of the adoptive parent as if such child had been *born* to the adoptive parent. For example, State statutes make the adopted child the "natural", or "genetic", or "biological" child of the adoptive parent; or the "legitimate blood descendant", or "child of natural bodily issue", or "natural child of the whole blood", or "as if born of their bodies".[8] Most States—either by statute or judicial rule—

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7. J. E. Rein, Relatives By Blood, Adoption and Association: Who Should Get What and Why, 37 Vand. L. Rev. 711, 731-732 (1984).

8. Ala. Code §26-10-5 (1975, Repl. Vol. 1986); Alaska Stat. §25.23.130 (1986); Ariz. Rev. Stat. Ann. §8-117 (1974); Ark. Stat. Ann. §56-215 (1971, Cum. Pkt. Supp. 1985); Colo. Rev. Stat. §19-4-113 (1986); Conn. Gen. Stat. §45-64(a) (1981, Cum. Ann. Pkt. Pt. 1987); D. C. Code Ann. §16-312 (1981); Fla. Stat. Ann. §63.172 (1985); Ga. Code Ann. §19-8-14 (1982); Hawaii Rev. Stat. §578-16 (1985); Idaho Code §16-1508 (1979); Ill. Rev. Stat. ch. 110½, §2-4 (1979); Ind. Code §29-1-6-1 (1976); Iowa Code Ann. §600.13 (1987); Kan. Stat. Ann. §59-2103 (1986); Ky. Rev. Stat. §199.520 (1982, Cum. Supp. 1986); Md. Fam. Law Code Ann. §5-308 (1984); Mass. Gen. Laws Ann. 210 §§6, 7, 8, (1958 Cum. Ann. Pkt. Pt. 1987); Mich. Comp. Laws Ann. §700.128 (1980); Minn. Stat. §259.29 (1980); Miss. Code Ann. §93-17-13 (1973); Mo. Rev. Stat. §453.090 (Vernon's 1986); Mont. Code. Ann. §40-8-125 (1985); Neb. Rev. Stat. §30-2309 (1974); Nev. Rev. Stat. Ann. §127.160 (1986); N. H. Rev. Stat. Ann. §170-B:20 (1955); N. J. Stat. Ann. §9:30-50 (1976, Cum. Ann. Pkt. Pt. 1987); N. M. Stat. Ann. §40-7-52 (1978, Repl. 1986); N. Y. Est. Powers & Trusts §2-1.3 (McKinney 1981); N. C. Gen.

provide for a standard of proof for the inclusion or exclusion of adopted children in dispositive instruments. For example, State statutes provide that such inclusion or exclusion "plainly", or "clearly", or "expressly", or "specifically" appear, and six States utilize a formula which approaches what we submit is the minimum standard required under the Fourteenth Amendment, namely, a reference to the adopted child by *name* or by some description *not* based on a parent and child or blood relationship.[9]

The standard of proof prescribed by the challenged Delaware rule offends the Fourteenth Amendment because it places a significant risk of error on innocent adopted stepchildren instead of placing *all* the risk of error upon the proponents of disinheritance. *Rivera* v. *Minnich*, ____ U.S. ____, Slip Op. June 25, 1987.

E. THE STATE'S ENFORCEMENT OF PROVISO (a) OFFENDS THE FOURTEENTH AMENDMENT

Enforcement by the Delaware Supreme Court of an invidious discrimination against adopted stepchildren—contrary to the mandate of Delaware's own adoption statute—does not pass constitutional muster. Section 919(a) of 13 *Del. C.* places an adopted child within his adoptive father's bloodline ("as if he had been born in wedlock to the adopting parent"). In Proviso (a) the scrivener used ambiguous language which does not unmistakably cover a *stepchild,* and substituted a contrary private definition of an

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Stat. §48-23 (1984); N. D. Cent. Code §14-15-14 (1981); Ohio Rev. Code Ann. §3107.15 (Baldwin 1987); Or. Rev. Stat. §112.175 (1979); Pa. Cons. Stat. Ann. §2107 (Purdon Cum. Ann. Pkt. Pt. 1987); R. I. Gen. Laws §15-7-16 (1981); S. C. Code Ann. §20-7-1770 (1976, Cum. Supp. 1986); Tenn. Code Ann. §36-1-126 (1984); Tex. Fam. Code Ann. §16.09 (Vernon 1986); Wash. Rev. Code Ann. §26.33.260 (1986); W. Va. Code §48-4-11 (1986 Repl. Vol.); Wis. Stat. §851.51 (1971).

9. Alaska, Arkansas, Connecticut, Florida, Georgia, and North Dakota.

adopted child for the Legislature's definition. A State cannot enforce such a private definition in face of its own statutory definition without doing violence to the due process clause.

The law firm which drew the indenture amendment is the same law firm which drew Section IV(2) of the indenture making 13 *Del. C.* §919(a) controlling as to meaning and validity of Proviso (a). (Pet. at 45a). Section 919(a) of 13 *Del. C.* does not provide for any rebuttable presumption; it unconditionally makes plaintiffs the "lawful blood descendants" of their adoptive stepfather.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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